



COMMONWEALTH of VIRGINIA

Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

Mary Broz-Vaughan
Director

January 8, 2021

Complainant: Valerie Fashion
Association: Courthouse Green Property Owners' Association
File Number: 2021-01229

The Office of the Common Interest Community Ombudsman has been designated to review final adverse decisions and determine if they may be in conflict with laws or regulations governing common interest communities. Such determination is within the sole discretion of the Office of the Common Interest Community Ombudsman and not subject to further review.

Complaint

The Complainant submitted multiple complaints to the Association dated August 20 and 28, 2020. The Association provided a response to the association complaint dated November 4, 2020. The Complainant then submitted a Notice of Final Adverse Decision (NFAD) to the Office of the Common Interest Community Ombudsman dated November 18, 2020 and received November 24, 2020.

Authority

The Common Interest Community Ombudsman (CICO), as designee of the Director, is responsible for determining whether a "final adverse decision may be in conflict with laws or regulations governing common interest communities" (18VAC 48-70-120). The process of making such a determination begins with receipt of a NFAD that has been submitted to this office in accordance with §54.1-2354.4 (Code of Virginia) and the Common Interest Community Ombudsman Regulations (Regulations). A NFAD results from an association complaint submitted through an association complaint procedure. The association complaint must be submitted in accordance with the applicable association complaint procedure and, as very specifically set forth in the Regulations, "shall concern a matter regarding the action, inaction, or decision by the governing board, managing agent, or association inconsistent with applicable laws and regulations.

Under the Regulations, “applicable laws and regulations” pertain solely to common interest community laws and regulations. Any complaint that does not concern common interest community laws or regulations is not appropriate for submission through the association complaint procedure. In the event that such a complaint is submitted to this office as part of a NFAD, a determination cannot be provided.

Determinations issued by the CICO are based solely on the association complaint submitted to the association, the final decision or determination from the association, and any documents that were part of the original association complaint or the association’s decision. New information that was not included with the original complaint or the association’s final decision will not be reviewed or utilized as part of the determination, unless such information is related to the way in which an association carried out its complaint process.

Determination

The Complainant submitted seven complaints to her association. The first complaint alleged violations of architectural guidelines and a leaning tree. This complaint is not appropriate for the complaint procedure.

The second complaint alleged that the office manager did not provide the board of directors a copy of a Form 990 and has not made a copy available. There is no reference to any common interest community law in this complaint and no evidence that this particular form was requested by the Complainant. This complaint is not appropriate for the complaint procedure.

The third complaint alleged that requests “were made so that an internal audit could be completed.” The Complainant alleged that she has not been given access to association records, association meetings, notice. No documentation was provided that explained the allegation that she had not been given access to meetings or notice. As for the documents request, several letters to the board were included in the NFAD that asked questions of the board regarding certain documents and information, and requested lists of documents going back a decade.

The fourth complaint alleged that the Complainant (who is also a board member) was not provided a copy of an updated agenda prior to a meeting on August 28, 2020 and that the other members did receive such a copy. No reference to common interest community law was provided. This complain is not appropriate for the complaint procedure.

The fifth complaint was in reference to the Nominations Committee and alleged that the Complainant was not provided the opportunity to review the nomination mail, that there was no meeting, and that they did not know how many homeowners returned their forms or how many nominations were made. The Complainant alleges that there was noncompliance by the Nominations Committee, but does not provide any information as

to what how the committee may have violated common interest community law. This complaint is not appropriate for the complaint procedure.

The sixth complaint also is in reference to the Nominations Committee and requests information related to the nominations, including returned nominations, lists of forms, names of individuals who sent in bios and reason for serving on the board, and the number of vacancies. There was no allegation of any violation of common interest community law included in this complaint.

The seventh and final complaint was again an information request and appeared to pertain to a loan that was obtained for a building. No allegation of common interest community law was included in this complaint.

The Association appears to have responded to nearly all the complaints submitted, regardless of whether they alleged a violation of common interest community law or not. This office will only summarize the portion of the Association's response that addressed the allegations that the Complainant was denied access to books and records, since those were the only allegations related to common interest community law.

In response to the allegations that the Association failed to provide requested records, the Association asked the Complainant to "[p]lease remake appointment requests to the Treasurer and Operations Manager to review the CGPOA financial statements for previous ten (10) years. Copies of CGPOA Documents are twenty-five (25) cents per page."

A failure to provide access to the books and records of an association is a violation of §55.1-1815¹. In this instance, it appears that the Complainant was requesting

¹ A. The association shall keep detailed records of receipts and expenditures affecting the operation and administration of the association. All financial books and records shall be kept in accordance with generally accepted accounting practices.

B. Subject to the provisions of subsection C and so long as the request is for a proper purpose related to his membership in the association, all books and records kept by or on behalf of the association shall be available for examination and copying by a member in good standing or his authorized agent, including:

1. The association's membership list and addresses, which shall not be used for purposes of pecuniary gain or commercial solicitation; and

2. The actual salary of the six highest compensated employees of the association earning over \$75,000 and aggregate salary information of all other employees of the association; however, individual salary information shall not be available for examination and copying during the declarant control period.

Notwithstanding any provision of law to the contrary, this right of examination shall exist without reference to the duration of membership and may be exercised (i) only during reasonable business hours or at a mutually convenient time and location and (ii) upon five business days' written notice for an association managed by a common interest community manager and 10 business days' written notice for a self-managed association, which notice reasonably identifies the purpose for the request and the specific books and records of the association requested.

C. Books and records kept by or on behalf of an association may be withheld from inspection and copying to the extent that they concern:

1. Personnel matters relating to specific, identified persons or a person's medical records;

documents in connection to her service on the board of directors. All books and records are available to a board member if the purpose for viewing or copying them "is in the discharge of his duties as a director." §55.1-1815(F). Unfortunately, it was difficult to ascertain from the complaint submitted to the Association whether all the requested records were in the discharge of the Complainant's duties as a director. Because this office cannot make that determination I cannot conclude that there was a violation as it pertains to §55.1-1815(F). However, even if the records were not related to the discharge of the Complainant's duties on the board, she would still have the right of access set forth in the law for members of an association (assuming she was in good standing at the time of the requests). Copies requested as a member of the association would potentially carry a cost, as outlined in Paragraph E of the statute.

Based on the volume of records requested, the multiple letters contained in the NFAD and no information from the Association as to whether it has met any of the requests, I can only find that the Association may have violated the Property Owners' Association Act by failing to provide the Complainant the right to examine the books and records of the Association.

2. Contracts, leases, and other commercial transactions to purchase or provide goods or services, currently in or under negotiation;

3. Pending or probable litigation. For purposes of this subdivision, "probable litigation" means those instances where there has been a specific threat of litigation from a person or the legal counsel of such person;

4. Matters involving state or local administrative or other formal proceedings before a government tribunal for enforcement of the association documents or rules and regulations promulgated pursuant to § 55.1-1819;

5. Communications with legal counsel that relate to subdivisions 1 through 4 or that are protected by the attorney-client privilege or the attorney work product doctrine;

6. Disclosure of information in violation of law;

7. Meeting minutes or other confidential records of an executive session of the board of directors held in accordance with subsection C of § 55.1-1816;

8. Documentation, correspondence, or management or board reports compiled for or on behalf of the association or the board by its agents or committees for consideration by the board in executive session; or

9. Individual lot owner or member files, other than those of the requesting lot owner, including any individual lot owner's or member's files kept by or on behalf of the association.

D. Books and records kept by or on behalf of an association shall be withheld from inspection and copying in their entirety only to the extent that an exclusion from disclosure under subsection C applies to the entire content of such books and records. Otherwise, only those portions of the books and records containing information subject to an exclusion under subsection C may be withheld or redacted, and all portions of the books and records that are not so excluded shall be available for examination and copying, provided that the requesting member shall be responsible to the association for paying or reimbursing the association for any reasonable costs incurred by the association in responding to the request for the books and records and review for redaction of the same.

E. Prior to providing copies of any books and records to a member in good standing under this section, the association may impose and collect a charge, reflecting the reasonable costs of materials and labor, not to exceed the actual costs of such materials and labor. Charges may be imposed only in accordance with a cost schedule adopted by the board of directors in accordance with this subsection. The cost schedule shall (i) specify the charges for materials and labor, (ii) apply equally to all members in good standing, and (iii) be provided to such requesting member at the time the request is made.

F. Notwithstanding the provisions of subsections B and C, all books and records of the association, including individual salary information for all employees and payments to independent contractors, shall be available for examination and copying upon request by a member of the board of directors in the discharge of his duties as a director.

The Complainant submitted many questions along with her records requests. There is no law that requires an association to respond to questions. Certainly it is always polite to respond to questions, but it is not legally required.

Required Actions

The Complainant, if in good standing, does have a right of access to the books and records, if requested in accordance with the law. In order to ensure that the right of access is provided, I ask the Complainant to create a list of documents that she has not yet received or examined and submit it to the Association and to my office (via email – cicombudsman@dpor.virginia.gov) within ten days of this Determination. **The list can only contain documents requested in the letters or complaints to the Association that made up the Notice of Final Adverse Decision.**

The Association must ensure that it provides the Complainant the right to examine the records she has requested, and if she wishes to obtain copies of them, they must provide them, but may charge in accordance with its cost schedule adopted as required by Paragraph E of §55.1-1818. The Association has already offered to do this in its response to the Complainant, but the Complainant wrote in her cover letter to this office that she had not received all the documents she requested.

The Complainant also stated in her cover letter, by handwritten notation, that she is no longer a member of the board of directors. As such, the right to inspect or copy records is subject to the exclusions enumerated in §55.1-1815(C) of the Property Owners' Association Act. While this provision does not apply to a member of the board of directors, it is applicable to any association member requesting access to the books and records, which appears to be the situation at present.

Please feel free to contact me if you have questions.

Sincerely,



Heather S. Gillespie
Common Interest Community Ombudsman

cc: Board of Directors
Courthouse Green Property Owners Association